SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER, 1970 Term

918

ODIS RUSSELL

versus

GREENVILLE SHIPBUILDING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting Petition	4
Argument	4
Summary	6
Certificate of Service	8
Appendix A	9
Appendix B	11
Appendix C	13
Appendix D	21

LIST OF AUTHORITIES

	Page
Atkins v. Greenville Shipbuilding Corporation, 411 Fed. 2d 279 (Cir. 5, 1969)	2, 3
Bernardo v. Bethlehem Steel, (2 Cir. 1963), 314 F.2d 604	2, 4, 6
Boutel v. Delamore, 379 F.2d 850 (Cir. 5, 1967)	2, 5
Butler v. Whitman, 356 U.W. 271, 2 F.2d 754 (1958)	2, 7
Keller v. U.S. 273 F. Supp. 945 (USDC, New Orleans Division)	2, 5
Offshore Co. v. Robinson, 266 F.2d 769 (Cir. 5, 1959)	2, 4
Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5, 1967)	2, 5, 6
Ross v. Yaka, 373, U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 488 (1963)	3
46 U.S.C.A. § 688	3
U.S. Constitution Art. 3, § 2, Cl. 1	3
Federal Rules of Civil Procedure. F.R.C.P. 9 H.	3

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1970 Term,

ODIS RUSSELL

versus

GREENVILLE SHIPBUILDING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Odis Russell, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a summary judgment by the United States District Court for the Northern District of Mississippi.

OPINIONS BELOW

The District Court for the Northern District of Mississippi rendered an opinion which is reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for

the Fifth Circuit, affirming the judgment is reprinted as Appendix "B" hereof.

The opinion of the Fifth Circuit Court of Appeals in: *Atkins v. Greenville Shipbuilding Corporation*, 411 Fed. 2d 279 (Cir. 5, 1969) a case involving almost identical facts and the basis for the Appellate Court's ruling in this case is reprinted as Appendix "C" hereof for this Honorable Court's ready reference.

The testimony of defendant's superintendent, Harry W. Mason, is reproduced as Appendix "D" hereof.

JURISDICTION

Original Federal Jurisdiction in this case predicated upon the Jones Act (46 USCA, 688) and the General Maritime Law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Bernardo v. Bethlehem Steel, (2 Cir. 1963), 314 F.2d 604;

Boatel v. Delamore, 379 F.2d 850 (Cir. 5, 1967)

Butler v. Whitman, 356 U.S. 271; 2 F.2d 754; (1958);

Kellar v. U.S., 273 F. Supp. 945 (USDC, New Orleans Division);

Offshore Co. v. Robinson, 266 F.2d 769, (Cir. 5, 1959);

Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5 1967);

Reed v. Yaka, 373, U.S. 410; 83 S.Ct. 1349, 10 L.Ed. 2d 488 (1963);

46 U.S.C.A. § 688;

U. S. Constitution, Art. 3, § 2, Cl. 1;

Federal Rules of Civil Procedure, F.R.C.P. 9 H.

STATEMENT OF THE CASE

Plaintiff originally commenced suit against the defendant in Admiralty pursuant to F.R.C.P. 9 H. The complaint was later amended to assert a second cause of action under the Jones Act 46 USCA 688.

On and prior to August 30, 1966, plaintiff had been employed as a welder aboard defendant's floating dry dock which was moored on a navigable body of water in Greenville, Mississippi, known as Lake Ferguson.

His original complaint alleged that the dry dock was a vessel and that on August 30, 1966, he was injured as a result of the vessel's unseaworthiness, basing his claim upon the doctrine enunciated by this Court in *Reed v. Yaka*, 373 U.S. 410; 83 S.Ct. 1349, 10 L.Ed. 2d 488 (1963). The amended pleadings alleged that plaintiff was a Jones Act seaman and prayed for a trial by jury. Defendant moved for and was granted a summary judgment. This was affirmed on Appeal, the Fifth Circuit Court of Appeals applying and following its decision in *Atkins v. Greenville Shipbuilding Corporation*, 411 Fed. 2d 279 (Cir. 5, 1969).

REASONS FOR GRANTING THIS PETITION

Since the petitioner is represented by the same counsel that applied for certiorari in the *Atkins* case, we are well aware that this Court refused writs in that litigation. However, we again earnestly appeal to this Court to grant a review here for the sake of resolving an obvious and patent conflict between the decisions in *Atkins*, the case at bar, and the decision of Second Circuit in, *Bernardo v. Bethlehem Steel*, (Cir. 2, 1963). It is further urged that *Atkins* and this case cannot possibly be reconciled with other holdings by the Fifth Circuit hereinafter cited and discussed.

ARGUMENT

The central and only issue in this case is:

CAN IT BE HELD AS A MATTER OF LAW THAT A DRY DOCK IS NOT A VESSEL?

In *Atkins*, the Court of Appeals held "*sub judice*" that it could and petitioner submits that its decision is completely contrary to the rationale of this Court's decisions and indeed, in direct conflict with several prior decisions of that Appellate Court.

In *Offshore Co. v. Robinson*, 266 F.2d 769, (Cir. 5, 1959), an historic and landmark opinion, it was recognized that special purpose vessels and those who man them were subject to the same maritime rules as traditional vessels and crews. Eight years later this same Appellate Court in a forward-looking decision that weighed present day realities in the maritime field held that such special purpose floating objects *as a matter of*

law were vessels; Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5, 1967). This was followed in *Kellar v. U. S.*, 273 F. Supp. 945 (U.S.D.C. New Orleans Division) and *Boatel v. Delamore*, 379 F.2d 850 (Cir. 5, 1967).

In light of the above, it is somewhat surprising that the Court's opinion in *Atkins* and the case at bar harken back to criteria that it rejected over a decade ago, i.e.:

(1) Lack of motive power;

(2) Permanent anchorage;

(3) The fact that the dry dock was not designed or used for navigation or transportation.

Of course, dredges, derrick barges, submersible drilling rigs (and numerous other types of specialized watercraft):

(1) Have not motive power;

(2) Spend months and/or years at a single anchorage;

(3) Are obviously not designed for navigation or the carriage of passengers and cargo.

Respondent's dry dock is admittedly a large, floating object moored in navigable waters. It is fully capable of carrying passengers, cargo and could be moved and used to transport goods and persons to any port in the world should its owner so desire. (See Appendix "D") The law is clear that:

> "The word 'vessel' includes every description of watercraft or other *artificial contrivance used or*

capable of being used, as a means of transportation on water." (Emphasis added.)

Vol. 1, Norris, The Law of Seamen, 2d Ed. Sec. 9.

Respondent has relied heavily upon the argument that petitioner was not "doing a seaman's work and incurring a seaman's hazards." This is reflected in the *Atkins* decision.

Historically, wooden sailing ships, included carpenters and shipwrights as regular crewmen. This was a necessity since in case of vessel damage at sea, on the spot repairs and reconstructions would be essential. But petitioner urges that this is not an issue before this Court. Oil field drillers, tool pushers, roustabouts, and derrick operators are hardly "*doing a seaman's traditional work*" — yet they admittedly are entitled to all maritime remedies if injured aboard a "vessel".

SUMMARY

In conclusion, petitioner respectfully submits that the two opinions of the Fifth Circuit create an arbitrary distinction where no difference exists.

It is patent that these holdings by the Fifth Circuit are in direct conflict with *Bernardo*, supra, which expressly held the exact same issue to be one for the jury. The Appellate Court appears to completely lose sight of the fact that the decisions involving dry docks cited in Atkins *were fact findings, not summary adjudications.* Nor can the result be reconciled with the Fifth Circuit's decision in *Producers' Drilling v. Gray*, supra, except by forging a completely illogical rule to the effect that a

special purpose craft drilling for oil, as a matter of law, is a vessel but one engaged in vessel construction, as matter of law, is not.

We believe this Court's decision in *Butler v. Whitman* 356 U.S. 271; 2 Fed. 2d 754 (1958), constitutes an express ruling by this Court that issues such as here presented are for the jury.

The true rationale of Atkins by the Appellate Court rests in its statement that: (Page 4)

> "*Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, *and its progeny, Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 1956 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448; *Jackson v. Lykes Bros. SS Co.*, 1967 386, U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488, *has resulted in metastasis, if not emasculation of the Act's exclusiveness of remedies provision.*"

The decision disapproves of this Court's extension of the doctrine of seaworthiness and by its conclusions not only seeks to turn back the clock, but in doing so will have created considerable inconsistancy and confusion in this phase of the maritime law should the result remain unchanged by a ruling from this Court.

All of which is

Respectfully submitted,

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BY:
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari were mailed to opposing counsel.

New Orleans, La. , October, 1970.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISON

No. GC 6811-S

ODIS RUSSELL,

Plaintiff

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant

MEMORANDUM OPINION

The aforesaid cause concerns claims under the Jones Act and under the doctrine of unseaworthiness by an individual who was injured while working on a barge which, at the time, was contained in a floating dry dock. On July 2, 1968, a Motion For Summary Judgment was filed by the defendant, Greenville Shipbuilding Corporation. On February 13, 1969, the Court entered an Opinion and Order overruling the Motion For Summary Judgment.

Since that date, the Fifth Circuit has decided *Louis L. Atkins v. Greenville Shipbuilding Corporation*, GC 6732, Appellate Court, 411 F.2d 279, 5 Cir. 1969. The fact situation of the *Atkins* case is very similar to the case sub judice, even though the *Atkins* case involves only the doctrine of unseaworthiness. Nevertheless, in ruling on the definition of a "vessel", the Fifth Circuit decided the un-

seaworthiness issue of the present case and through dictum decided the Jones Act issue.

The Court decided that as a matter of law, the floating dry dock was not a "vessel". In arriving at this conclusion the Court discussed *Offshore Company v. Robinson*, 266 F.2d 769, 5 Cir. 1959, which is a Jones Act case. The Court stated definitely at 411 F.2d 282, that the "initial determination must be whether the craft or structure upon which the shore based worker was injured is a 'vessel' owing a warranty of seaworthiness".

Since the Fifth Circuit held as a matter of law that the floating dry dock was not a vessel, this Court feels compelled to reconsider the defendant's Motion For Summary Judgment. After careful consideration of the record and the *Atkins* case, the Court is of the opinion that the defendant's Motion For Summary Judgment should be sustained. An appropriate order will be entered.

This the 13th day of January, 1970.

ORMA R. SMITH

UNITED STATES DISTRICT JUDGE

APPENDIX B

ODIS RUSSELL,

Plaintiff-Appellant,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(July 15, 1970)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: This action by plaintiff Russell against defendant Greenville Shipbuilding Corporation asserts claims under the Jones Act and under the doctrine of unseaworthiness by an individual who was injured while working on a barge which, at the time, was contained in a floating drydock. The district court granted a motion for summary judgment in favor of defendant Greenville Shipbuilding Corporation and plaintiff appeals.[1]

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[1] Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. *See Murphy v. Houma Well Service*, 5 Cir., 1969, 409 F.2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir., 1969, 417 F.2d 526, Part I.

Plaintiff's counsel recognizes that the facts in the case at hand are identical to those presented by *Atkins v. Greenville Shipbuilding Corporation*, 5 Cir., 1969, 411 F.2d 279, cert. den. 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed. 2d 96, but suggests by this appeal that the courts overrule *Atkins*. This we are not disposed to do.

The granting of the motion for summary judgment by the district court was correct and the judgment is

AFFIRMED.

APPENDIX C

ODIS RUSSELL,

Plaintiff-Appellant,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(May 12, 1969)

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

DYER, Circuit Judge: Atkins, a shore-based welder and fitter employed on Greenville Shipbuilding Corporation's floating dry dock, sustained injuries when a ladder, which he was using to ascend a barge brought onto the dry dock for major repairs, slipped causing his fall to the dry dock's floor. Although he received compensation from Greenville under the Longshoremen's and Harbor Workers' Compensation Act,[1] Atkins, claiming to be a *Reed v. Yaka*[2] seaman not limited exclusively to the remedies of the Act, sued his employer Greenville for breach of the maritime warranty of seaworthiness, alleging that the floating dry dock was a "vessel" and that the ladder was a part of its gear and tackle. Greenville moved for summary judgment on the grounds that no warranty of seaworthiness

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1 33 U.S.C.A. §§ 901 et seq.
2 *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448

was owed to Atkins because the floating dry dock was not a "vessel" and because Atkins was not doing a seaman's traditional work. The District Court granted the motion upon the latter ground; we affirm on the former.

Greenville Shipbuilding Corporation is engaged in the business of designing, constructing and repairing steel vessels, barges, towboats, floating dry docks and marine vessels at its shipyard on the banks of Lake Ferguson, a navigable waterway near Greenville, Mississippi, on the Mississippi River. As an instrument for the repair of vessels at its Lake Ferguson shipyard, during the years 1961-62 Greenville constructed a floating dry dock which since that time has been floating upon the lake's waters, permanently affixed to the bank of the lake. The dock itself, a large flat surface, is lowered from its floating position within a steel frame by pumping water into watertight compartments. Next the vessel to be repaired is situated above it, after which the dock is raised by pumping air into the compartments. The buoyancy lifts dock and vessel for accessibility to repairmen. The dry dock's position is maintained on the waterfront by cables running to the bank. It is in the exact position in which it was placed upon construction, and it was neither designed for nor used for navigation or transportation. The floating dry dock is without motive power and could only be moved upon water from one place to another by being towed or by other outside power.

On July 26, 1966, the Barge K.C.B. 300 was placed on the dry dock for major repairs to eliminate leaks, requiring among other things removal and replacement

of two sections below her waterline and welding of various cracks. This work could only be done by removing the barge from the water.

Atkins a welder and fitter employed by Greenville, worked on the barge that day. In mid-afternoon he began ascending a ladder leading from the floor, or "dock", of the floating dry dock to the barge. The ladder slipped, and Atkins fell to the floor of the dry dock, sustaining injuries.

As a result of the accident, Atkins made a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, and since filing the claim has received and accepted benefits of approximately three thousand dollars. On June 30, 1967, Atkins filed his complaint alleging injuries sustained due to the unseaworthiness of a "vessel" owned by Greenville, specifically alleging injuries resulting from a defective and unseaworthy ladder which was part of the vessel's gear and tackle. Greenville defended the unseaworthiness claim upon the grounds that Atkins was not doing traditional seamen's work and that the floating dry dock was not a "vessel". The District Court, finding no material facts to be in dispute, held that Atkins was not engaged in work traditionally that of a seaman and entered summary judgment in favor of Greenville.

Atkins is clearly within the compensation provisions of the Longshoremen's Compensation Act,* and Green-

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*The Act provides that compensation shall be payable "if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any dry dock*) . . . 33 U.S.C.A. § 903(a) (emphasis added). *See Avondale Marine Ways, Inc. v. Henderson*, 1953, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77; *Travelers Insurance Company v. Shea*, 1967, 382 F.2d 344, 347-48.

ville is equally as clearly an employer under the Act.[4] However, Atkins seeks to avoid the Act's exclusiveness of liability section,[5] which quite explicitly would preclude any further recovery against Greenville, the employer, if the section is given its literal meaning. His technique of avoidance is manipulation of the doctrine of seaworthiness, which as amplified by *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and its progeny, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448; *Jackson v. Lykes Bros. Steamship Co.*, 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, has resulted in metastasis, if not emasculation, of the Act's exclusiveness of remedies provision. In *Sieracki* the Supreme Court extended the scope of the maritime warranty of seaworthiness in favor of shore-based employees, including longshoremen, engaged aboard a vessel in work customarily or traditionally performed by seamen, thus allowing longshoremen under the Act to recover against third persons. *Reed* and *Jackson* extended the *Sieracki* extension to allow longshoremen, independently of the Act or its exclusiveness of remedies provision, to recover directly from their employers for injuries resulting from unseaworthiness where the employer is the owner of or has an operational interest in the vessel.

However, regard for the historical development of

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[4] U.S.C.A. § 902(4) provides that an "employer" under the Act is an employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any dry dock*). [Emphasis added.]

[5] 33 U.S.C.A. § 905 provides in pertinent part:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . . .

the warranty of seaworthiness and appreciation of the influences upon its development, from *The Osceola*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, through *Sieracki*, *Reed* and *Jackson*, reveals that Atkins cannot so easily ensconce himself within the expanded scope of the warranty. With the advent of an increasingly complex and dangerous maritime service it was held that the owners owed to the seaman the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. *The Osceola supra. See The State of Maryland*, 4 Cir. 1936, 85 F.2d 944. In *Sieracki*, by a willingness to recognize substance over form, the warranty was made applicable to those "doing a seaman's work and incurring a seaman's hazards," *Sieracki, supra* at 99, despite " 'the fortuitous circumstance' of their employment by one other than the owner to do the ship's work," or "more modern divisions of labor." *Id.* at 98, 96. Others doing a seationale is the limiting factor of tradition. The limitaed the scope of the warranty, implicit within their raman's traditional work have been included within the warranty. *E.g., Pop & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143. In addition to expanding the class of persons covered by the warranty, due to the emergence of special purpose craft, the vessels owing the warranty in recent years also have become more diverse; again through recognition of substance over form. *See Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769.

But despite expansions of the warranty because of the technical progress of the modern maritime service, tradition plays an important role. While the *Sieracki*, *Reed* and *Jackson* decisions in one sense expand-

tion requires that the injured shore-based worker be engaged in work traditionally that of a seaman, *United N.Y. and N.J. Pilots Association v. Halecki*, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541, excluding those persons performing such tasks as making major repairs requiring dry docking or special skills. *See West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161; *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 5 Cir. 1967, 377 F.2d 511, *Union Carbide Corporation v. Goett*, 4 Cir. 1958, 256 F.2d 449; *Berge v. National Bulk Carriers Corporation*, 2 Cir. 1958, 251 F.2d 717; *Berryhill v. Pacific Far East Line*, 9 Cir. 1956, 238 F.2d 385. By the same token, the craft or structure said to owe a warranty of seaworthiness must fall within the traditional category of "vessels". *Cf. Offshore Company v. Robison*, *supra* at 781.

Concentrating upon Atkins' duties in making major repairs to the barge placed on the dry dock, the District Court held that Atkins was not engaged in work traditionally that of a seaman, hence denying recovery because he was outside the class of persons within the warranty's coverage. In doing so the District Court deemed it unnecessary to decide whether the floating dry dock was a "vessel" owing a warranty of seaworthiness. We disagree with that approach.

In view of this Court's decision in *Offshore Company v. Robison*, *supra*, the initial determination must be whether the craft or structure upon which the shore-based worker was injured is a "vessel" owing a warranty of seaworthiness. Only following a determination that the craft or structure is a "vessel" does it become necessary to decide whether the worker's duties

were those traditionally performed by seamen, *Halecki, supra*, or in the case of unconventional specialty craft, duties contributing to the accomplishment of the vessel's mission, *Offshore Company v. Robison, supra*, in which case the warranty of the vessel's seaworthiness would be owing to the plaintiff.

Although the District Court made no determination whether the floating dry dock *sub judice* was a "vessel" owing a warranty of seaworthiness, since no material facts are in dispute as to the nature, purpose or character of the structure this Court may make that determination. The appellant contests only the ultimate fact whether a floating dry dock is a special purpose vessel owing a warranty of seaworthiness, not whether the floating dry dock was in fact a floating dry dock, and contends that the ultimate determination can only be made by a jury. We disagree and hold as a matter of law that the floating dry dock *sub judice* was not a "vessel" owing a warranty of seaworthiness.

Since *Cope v. Vallette Dry Dock Company*, 1887, 119 U.S. 625, 7 S.Ct. 417, 30 L.Ed. 501, if not before, *Snyder v. A Floating Dry Dock, D.N.J.* 1884, 22 F. 685, it has been clear that a floating dry dock is not a "vessel". *Cope v. Vallette Dry Dock Company, supra*, held that a floating dry dock was not a "vessel" for purposes of salvage. The same considerations are applicable to whether a warranty of seaworthiness is owed. "A fixed structure such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water." *Cope, supra* at 627. Mere flotation on water does not constitute a structure a

"vessel" for purposes of salvage nor warranty of seaworthiness. The element of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating dry docks. *Compare Cope v. Vallette Dry Dock Co., supra* at 627-29, *with Seas Shipping Co. v. Sieracki, supra* at 93-95, 99. While ordinarily "attempts to fix unvarying meanings [that] have a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts" *Offshore Company v. Robison, supra* at 779, no particular difficulties are here presented.

We find nothing in *Producers Drilling Company v. Gray*, 5 Cir. 1967, 361 F.2d 432, or *Bernardo v. Bethlehem Steel Company*, 2 Cir. 1963, 314 F.2d 604, which requires departure from the settled rule that a floating dry dock is not a vessel. The former dealt with a barge, which it is well settled may be a vessel, *Producers Drilling, supra* at 435, and in *Bernardo* the Court was not called upon to make the determination we here make. *Supra* at 608.

AFFIRMED.

APPENDIX D

Q. Now, referring to the dry dock, you can move this from place to place, can you not, by the use of tugs?

A. By using outside power.

Q. It could be moved from one mooring to another mooring?

A. Right.

Q. And, in the course of moving it from one mooring to another mooring, of course it would be possible to move with it anything that happened to be aboard? In other words, if you had workmen aboard it, if you had vessels aboard it, or if you had anything else aboard it, they could be moved right along with the dry dock from one place to another, if you (30) wanted to?

A. If you had enough power, yes.

Q. If you had the power. Wouldn't it also be possible, if you wished to do so, to construct living quarters above the dry dock, if you wanted to have them there — ignoring whether it is customary to do it or not, if you wished to construct it?

A. It wouldn't be practical, because it would cut down on your work space.

Q. Conceding that, Mr. Mason, if you did wish for any particular reason to have living quarters aboard it, you could construct it, couldn't you?

A. You could build it, if you wanted to put it on there, yes, but it would, like I say, cut down on your work space.

Q. It wouldn't operate as efficiently as it operates the way you have it drawn?

A. That's right.

Q. And this dry dock, of course, is used exclusively for the repair and for working on vessels?

A. That's right.

SUPREME COURT, U. S.

FILED

NOV 20 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 918

ODIS RUSSELL,
Petitioner,

vs.

GREENVILLE SHIPBUILDING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities II

Introduction 1

Opinions Below 2

Jurisdiction 2

Statutes Involved 3

Questions Presented 4

Statement of the Case 4

Reasons for Denying Certiorari:

(a) The Decision of the Court of Appeals Does Not Conflict with the Decision of the U. S. Court of Appeals for the Second Circuit in Bernardo v. Bethlehem Steel Company 5

(b) The Question of Whether or Not a Floating Dry Dock Was a "Vessel" Was Resolved by This Court As Early As 1887 and Has Not Been Disturbed Since 8

(c) Nothing Contained in the Atkins Decision Conflicts with the Doctrine of Reed v. Yaka 9

(d) The Doctrine of Reed v. Yaka Is Inapplicable to Drydock Workers and Petitioner's Theory Would Create an Arbitrary Distinction in the Law of the Sort This Court Sought to Eliminate in Reed v. Yaka 13

(e) The Jones Act and the Longshoremen's and Harbor Workers' Compensation Act Provide Mutually Exclusive Remedies for Employees Against Their Employer, and, Inasmuch As Petitioner Is Covered by the Longshoremen's Act, He Necessarily Has No Remedy under the Jones Act 17

(f) This Court Should Not Consider Alleged Inconsistencies in the Holdings of the United States Court of Appeals for the Fifth Circuit 20

Conclusion 22

Certificate 23

Table of Authorities

Atkins v. *Greenville Shipbuilding Corporation*, 411 F.2d 279 (5 Cir., 1969), cert. den. 396 U.S. 846 (1969) 5, 8, 11, 12, 13, 17, 19, 20, 21

Avondale Marine Ways, Inc. v. *Henderson*, 346 U.S. 366 (1953) 11, 16, 21

Berge v. *National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S.D. N.Y., 1957) 12

Bernardo v. *Bethlehem Steel Company*, 169 F. Supp. 914 (S.D. N.Y., 1959), 200 F. Supp. 534 (S.D. N.Y., 1961), affirmed 314 F.2d 604 (2 Cir., 1963) 5, 6, 7

Berryhill v. *Pacific Far East Line*, 238 F.2d 385 (9 Cir., 1956) cert. den. 354 U.S. 938 (1957) 12

Berton v. *Tietjen & Lang Dry Dock Co.*, 219 Fed. 763 (D. N.J., 1915) 8

Cope v. *Vallette Dry Dock Company*, 119 U.S. 625 (1887) 8

DeMartino v. *Bethlehem Steel Company*, 164 F.2d 177 (1 Cir., 1947) 8

Flowers v. *Travelers Insurance Company*, 258 F.2d 220 (5 Cir., 1958) 19

Hawn v. *American S.S. Co.*, 107 F.2d 999 (2 Cir., 1939) 18

Jackson v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967) 9, 16

Kyles v. *James W. Elwell & Co.*, 296 F.2d 703 (7 Cir., 1961) 18

Madden v. *United States*, 259 F. Supp. 663 (D. Mass., 1966) 12

Moye v. *Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5 Cir., 1968) 12

Neal v. *Saga Shipping Co., S. A.*, 407 F.2d 481 (5 Cir., 1969) 18

Nogueira v. *New York, N. H. and H. R. Co.*, 281 U.S. 128 (1930) 18

Ocean Drilling & Exploration Company v. *Berry Bros. Oilfield Service, Inc.*, 377 F.2d 511 (5 Cir., 1967) 12

Offshore Co. v. *Robison*, 266 F.2d 769 (5 Cir., 1959) 20

Parker v. *Cargill, Inc.*, 417 F.2d 772 (5 Cir., 1969) 12

Pennsylvania Railroad Co. v. *O'Rourke*, 344 U.S. 334 (1953) 18

Perry v. *Haines*, 191 U.S. 17 (1903) 8

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406 (1953) 15

Price v. *S.S. Yaracuy*, 378 F.2d 156 (5 Cir., 1967) 18

Producers Drilling Co. v. *Gray*, 361 F.2d 432 (5 Cir., 1967) 20, 21, 22

Raidy v. *United States*, 153 F. Supp. 777 (D. Md., 1957), affirmed 252 F.2d 117 (4 Cir., 1958) 12

Reed v. *Yaka*, 373 U.S. 410 (1963) 1, 4, 9, 11, 13, 15, 16, 17

Roper v. *United States*, 368 U.S. 20 (1961) 12

Russell v. *Greenville Shipbuilding Corporation*, 428 F.2d 1168 (5 Cir., 1970) 2, 5

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 9, 14

San Cristobal, The, 215 Fed. 615 (S.D. Ala., 1914), affirmed 230 Fed. 599 (5 Cir., 1916) 8

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946) 9, 14

Snyder v. *A Floating Dry Dock*, 22 Fed. 685 (D. N.J., 1884) 8

Swanson v. *Marra Brothers, Inc.*, 328 U.S. 1 (1946) 18

Thibodeaux v. *J. Ray McDermott & Co.*, 276 F.2d 42 (5 Cir., 1960) 7

Thomas v. *Peterson Marine Service, Inc.*, 411 F.2d 592 (5 Cir., 1969) 18

Travelers Insurance Company v. *Shea*, 382 F.2d 344 (5 Cir., 1967) 19

United N. Y. and N. J. Pilots Association v. *Halecki*, 358 U.S. 613 (1959) 12

United States v. *Bethlehem Steel Company*, 235 F. Supp. 569 (D. Md., 1964) 8

Warfield, The, 120 Fed. 847 (E.D. N.Y., 1903) 8

Warner v. *Goltra*, 293 U.S. 155 (1934) 18

Warren v. *Pacific Inland Navigation Company*, 204 F. Supp. 31 (D. Ore. 1962) 12

West v. *United States*, 361 U.S. 118 (1959) 12

CONSTITUTION

United States Constitution, Article III, §2, Cl. 1 2

STATUTES

Jones Act, 46 U.S.C. §688 ..... 2, 4, 7, 17, 18, 20

Judicial Code, 28 U.S.C. §1254(1) 2

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq. 2, 3, 4, 14, 16, 17, 18, 19, 20

OTHER AUTHORITIES

1 Benedict on Admiralty, (6th Ed., 1940) §54 8

Gilmore and Black, *The Law of Admiralty* (1957) §§1-11, 6-52 ..... 9, 18

Norris, *Maritime Personal Injuries* (2d Ed., 1966) §§21, 23 ..... 8-9, 18

Norris, *The Law of Seamen*, (3d Ed., 1970) §§17, 668 ..... 9, 18

Robinson on Admiralty, (1939) §§8, 40 ..... 9, 18

2 Am. Jur. 2d, *Admiralty*, §34 9

2 C.J.S., *Admiralty*, §18b 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 918

ODIS RUSSELL,
Petitioner,

VS.

GREENVILLE SHIPBUILDING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case involves an attempt by Petitioner to extend the doctrine of *Reed* v. *Yaka*, 373 U.S. 410 (1963), far beyond anything contemplated by this Court when that case was decided. Recognizing that this case was a far cry from being within the scope of *Reed* v. *Yaka*, both the United States District Court for the Northern District of Mississippi and the United States Court of Appeals for the

Fifth Circuit rejected Petitioner's contentions. Here the Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. Rather, the Court of Appeals' decision rests upon a doctrine enunciated by this Court in 1887 and undisturbed by this or any other court in eighty-three years. There being no special or important reasons for the granting of this Petition for Certiorari, Respondent respectfully submits that the Petition should be denied.

OPINIONS BELOW

The United States District Court for the Northern District of Mississippi rendered an opinion on January 13, 1970, granting summary judgment for Respondent. This opinion is reprinted as Appendix A to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court was handed down on June 15, 1970, and is reprinted as Appendix B to the Petition for a Writ of Certiorari. *Russell* v. *Greenville Shipbuilding Corporation*, 428 F.2d 1168 (5 Cir., 1970).

JURISDICTION

Original federal jurisdiction of this cause was predicated upon the general maritime law of the United States, United States Constitution, Article III, Section 2, Clause 1, and under the Jones Act. 46 U.S.C. §688. This Court has discretion as to whether or not it will review this case under the authority granted in Section 1254(1), Title 28, United States Code.

STATUTES INVOLVED

Section 903, Title 33, United States Code:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

Section 905, Title 33, United States Code:

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

QUESTIONS PRESENTED

Petitioner has formally presented only one specific question for consideration by the Court:

Whether or not, under the facts in this case, Respondent's floating dry dock was a "vessel."

In this brief, Respondent will discuss this question expressly raised by Petitioner and also several additional questions which appear to be raised by implication.

STATEMENT OF THE CASE

Petitioner, Odis Russell, filed this suit alleging the unseaworthiness of a floating dry dock owned by Respondent and a causal connection between such alleged unseaworthiness and personal injuries which he sustained on or about August 30, 1966. Thereafter, Petitioner sought and obtained leave to amend his Complaint to assert a count for Jones Act negligence. Prior to the date of his injury, Petitioner had been employed as a welder on board said floating dry dock, which was securely moored to the banks of Lake Ferguson, a navigable body of water near Greenville, Mississippi.

Respondent answered the suit alleging, among other things, that Petitioner was a longshoreman within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and that Respondent was an employer within the meaning of that Act. Respondent further alleged that the injury or accident occurred on a dry dock which would clearly bring the case within the express language of the Longshoremen's Act. 33 U.S.C., §903. Recognizing that *Reed* v. *Yaka, supra,* had created an exception to the ordinary exclusiveness of liability provisions of the Longshoremen's Act, Respondent further alleged that at the time

of his accident and injury, Petitioner was not on board any "vessel" nor was he engaged in duties traditionally performed by seamen.

After development of the facts through various discovery procedures, Respondent moved for summary judgment. Relying on *Atkins* v. *Greenville Shipbuilding Corporation*, 411 F.2d 279 (5 Cir., 1969), cert. den. 396 U.S. 846 (1969), the District Court granted summary judgment and, on appeal, the United States Court of Appeals for the Fifth Circuit affirmed. *Russell* v. *Greenville Shipbuilding Corporation*, 428 F.2d 1168 (5 Cir., 1970).

REASONS FOR DENYING CERTIORARI

(a) The Decision of the Court of Appeals Does Not Conflict with the Decision of the U. S. Court of Appeals for the Second Circuit in Bernardo v. Bethlehem Steel Company

Petitioner argues, as his primary reason why this Court should grant certiorari, that the Court of Appeals' decision in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Bernardo* v. *Bethlehem Steel Company*, 314 F.2d 604 (2 Cir., 1963). With all due respect, Respondent submits that there is absolutely no conflict between the decision of the Court of Appeals for the Fifth Circuit here and the decision of the Court of Appeals for the Second Circuit in *Bernardo*. Respondent submits that the Court of Appeals in *Atkins*, and by implication in this case, was correct in noting the absence of such a conflict as Petitioner here urges (See Appendix C to Petition for Certiorari, p. 20).

The *Bernardo* case has a long history. See *Bernardo* v. *Bethlehem Steel Company*, 169 F. Supp. 914 (S.D. N.Y., 1959), on Defendant's motion for summary judgment: and

Bernardo v. *Bethlehem Steel Company*, 200 F. Supp. 534 (S.D. N.Y., 1961), on Plaintiff's motion for judgment notwithstanding the verdict. With respect to the opinion of the Court of Appeals in *Bernardo*, which Petitioner here points to as being in conflict with the decision of the Court of Appeals in the instant case, we would point out that the situation in *Bernardo* was procedurally the opposite of our case. In *Bernardo*, the District Court jury had found that the dry dock was not a "vessel" and had returned a verdict accordingly. On appeal Plaintiff was attacking the jury verdict on the ground that the dry dock should have been held to be a vessel as a matter of law. In this posture, the Court of Appeals naturally concerned itself with whether or not there was sufficient evidence in the record to support the jury finding that the dry dock was not a vessel. The holding of the Court of Appeals in *Bernardo* was that there was an evidentiary basis in the record to support the verdict of the jury.

The Court of Appeals in *Bernardo* stated that, because of the procedural posture of the case, the position of the Defendant before trial and verdict, that as a matter of law the dry dock was not a vessel, was not properly before the Court for decision. Therefore, the Court stated that it was not passing on this argument advanced by Defendant but instead was merely holding that the verdict of the jury should not be disturbed. 314 F.2d at 608. Thus, the Court of Appeals in *Atkins* was quite correct in noting that "In *Bernardo* the Court was not called upon to make the determination we here make." Appendix C to Petition for Writ of Certiorari, p. 20.

When *Bernardo* was before the Court on motion for summary judgment, it appeared from the record before the Court on that motion that the Plaintiff alternated in working on the various dry docks owned by Defendant and

on board various vessels owned and/or controlled by Defendant. 169 F. Supp. at 916. This evidence clearly presented an issue of fact on the question of whether or not Plaintiff was a member of the crew of a vessel, thus precluding summary judgment. In the case now before this Court, however, neither the District Court nor the Court of Appeals found any such issue of fact. Here it is uncontradicted that the Petitioner never worked on a vessel. All of his time was spent on the dry dock and on shore in the shipyard.

Further, the District Court in *Bernardo* recognized the vitality of such decisions of the United States Court of Appeals for the Fifth Circuit as *Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F.2d 42 (5 Cir., 1960), and expressly held that the rule, that Jones Act cases must be submitted to a jury

> "is not absolute, and in certain cases it is still possible for the Court to direct the verdict where the evidence clearly resolved the issues in favor of either side." 200 F. Supp. at 537.

Of course, summary judgment is also available where there is no genuine issue as to any material fact in a maritime personal injury action.

All of this history of the *Bernardo* case makes it clear that there is nothing in *Bernardo* which is in conflict with the holdings of the United States Court of Appeals for the Fifth Circuit in *Atkins* or in the case at bar. For that reason, there is no conflict between the Circuits which would support a grant of this petition for a writ of certiorari.

(b) The Question of Whether or Not a Floating Dry Dock Was a "Vessel" Was Resolved by This Court As Early As 1887 and Has Not Been Disturbed Since.

Petitioner objects strenuously to the holding by the United States Court of Appeals for the Fifth Circuit in *Atkins* and in this case that as a matter of law a floating dry dock is not a "vessel". Respondent respectfully submits that the holding of the Court of Appeals here is completely sound, and furthermore that there is no reason for this Court to review that holding because of the fact that this Court is already firmly on record in support of that holding. *Cope* v. *Vallette Dry Dock Company*, 119 U.S. 625 (1887).

Respondent has thoroughly researched the case law on the question of whether or not a dry dock is a "vessel". We have found numerous cases and authorities dealing with this question and these cases have arisen in a wide variety of contexts, and have construed the provisions of several statutes. In none of these cases, however, has any Court suggested that a dry dock should be considered a vessel. They all hold that a dry dock is not a vessel.

The following authorities support the proposition that a dry dock is not a "vessel". *Cope* v. *Vallette Dry Dock Company*, *supra*; *Perry* v. *Haines*, 191 U.S. 17 (1903); *Snyder* v. *A Floating Dry Dock*, 22 Fed. 685 (D. N.J., 1884); *The Warfield*, 120 Fed. 847 (E.D. N.Y., 1903); *The San Cristobal*, 215 Fed. 615 (S.D. Ala., 1914), affirmed 230 Fed. 599 (5 Cir., 1916); *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 Fed. 763 (D. N.J., 1915); *DeMartino* v *Bethlehem Steel Company*, 164 F.2d 177, 179 (1 Cir., 1947); *United States* v. *Bethlehem Steel Company*, 235 F. Supp. 569 (D. Md. 1964); *1 Benedict on Admiralty* (6th ed., 1940), §54, p. 115, fn. 21; Norris, *Maritime Personal In-*

juries (2d ed., 1966), §12, p. 23; 1 Norris, *The Law of Seamen* (3d ed., 1970), §17, p. 42; Gilmore and Black, *The Law of Admiralty* (1957), §§1-11, pp. 29-30); *Robinson on Admiralty* (1939), §8, p. 45; 2 C.J.S., *Admiralty*, §18b; 2 Am. Jur. 2d, *Admiralty*, §34.

All of the above authorities, when coupled with the decision of the Court of Appeals below, make it abundantly clear that a floating dry dock simply is not within the legal definition of a "vessel". This matter being so well settled, Respondent respectfully submits that further consideration of the question by this Court is unnecessary.

(c) Nothing Contained in the Atkins Decision Conflicts with the Doctrine of Reed v. Yaka.

In *Reed* v. *Yaka*, *supra*, this Court held that a shore-based worker engaged in seaman's work could sue his employer under the doctrine of unseaworthiness for injuries proximately caused by any unseaworthy condition on an employer-owned vessel. Petitioner argues in his petition that the Court of Appeals' decision below was contrary to the holding of *Reed* v. *Yaka*, and that therefore this Court should grant certiorari and reverse, presumably as it did in *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967).

A review of the facts in this case makes it immediately apparent that Petitioner's reliance upon *Reed* v. *Yaka* is misplaced. A study of the history of the *Reed* v. *Yaka* doctrine is necessary to a proper understanding of the contours of that doctrine. See *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); and *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). An examination of these cases makes it clear that before a longshoreman may come within the doctrine of *Reed* v. *Yaka*, he must establish (1) that he was working on board an employer-

owned "vessel", the unseaworthiness of which proximately caused or contributed to his injuries, and (2) that at the time of his injuries he was engaged in work traditionally that of a seaman. Factually, Petitioner passes neither test in this case.

The dry dock with which we are here concerned was built and constructed by Greenville Shipbuilding Corporation at its shipyard during the years 1961 and 1962. This dry dock is situated on Lake Ferguson adjacent to the banks of Lake Ferguson. Its position is maintained on the waterfront by cables running from said floating dry dock to the bank of Lake Ferguson. This floating dry dock is now situated in the exact position in which it was placed when construction of it was completed, and said dry dock has never been moved from such position since that time. Further, this dry dock was neither designed for, nor has it been used for, navigation or commerce upon the waterways of the United States. The dry dock is without power to propel itself and could be moved from one place to another only by being towed by some vessel or through power supplied from an outside source.

The dry dock is a steel framed structure of the type commonly used in making repairs upon vessels, towboats, barges, etc. The dock itself, which is a large flat surface resembling a floor, can be lowered and raised within the steel frame. When water is pumped into the watertight compartments of the dock, the dock is lowered below the surface level of the water. This is done so that the particular vessel to be repaired may be moved into place. Once such vessel is situated within the frame directly above the submerged dock, the water is pumped out of the compartments and buoyancy of the dock raises the vessel. Once the dock has been raised in this manner and the vessel to be repaired has been lifted out of the water,

the vessel becomes accessible to the repairmen for their work.

This structure sounds very little like anything even remotely resembling a "vessel". The United States Court of Appeals for the Fifth Circuit below held, as a matter of law, that this floating dry dock was not a vessel. Compare *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366, 367 (1953) (Concurring opinion). There being no "vessel" in the picture, there was nothing to be unseaworthy. There being no object the unseaworthiness of which would give rise to a cause of action, Petitioner does not fall within *Reed* v. *Yaka*.

Turning now to the type of work being done by Petitioner, the District Court accurately noted that Petitioner "was injured while working on a barge which, at the time, was contained in a floating dry dock". Appendix A to Petition for Writ of Certiorari, p. 9. The District Court further noted that "the fact situation of the *Atkins* case is very similar to the case sub judice". Since Petitioner here and Petitioner in *Atkins* were engaged in almost identical duties, it is relevant here to quote from the conclusions reached by the District Court in *Atkins*.

> "The Plaintiff was engaged in repairs of such a character as to require the complete removal of the Barge K.C.B. 300 [here the Barge DAVID] from the water; these repairs could not have been performed at sea; special equipment unrelated to the barge's seagoing operations was required to accomplish these repairs; the assistance of the regular crew was not called upon; the barge upon which the repairs were being performed (and the dry dock, too, for that matter) was, during the course of said repairs, not subject to any of the perils of navigation; neither the barge nor the dry dock had at the time of Plaintiff's injury crew members aboard to assist in navigation and the repairs themselves involved replacement of or repair to major

> portions of the barge. Looking to the character of the work being performed by the Plaintiff, it seems clear, and the Court so holds, that he was at the time of his injury not engaged in work traditionally that of a seaman. Therefore, it follows that he is not one to whom the doctrine of unseaworthiness is available. Plaintiff having an adequate remedy under the Longshoremen's Act and not being one who can avoid its exclusiveness of liability provision, the present action based on unseaworthiness must fail." See *Atkins* v. *Greenville Shipbuilding Corporation*, United States Court of Appeals for the Fifth Circuit, No. 26,550, Appendix, pp. 54-55.

The holding of the District Court in *Atkins* finds support in the holdings of a large number of cases decided by various federal courts. *United N. Y. and N. J. Pilots Association* v. *Halecki*, 358 U.S. 613 (1959); *West* v. *United States*, 361 U.S. 118 (1959); *Roper* v. *United States*, 368 U.S. 20 (1961); *Berryhill* v. *Pacific Far East Line*, 238 F.2d 385 (9 Cir., 1956), cert. den. 354 U.S. 938 (1957); *Ocean Drilling & Exploration Company* v. *Berry Bros. Oilfield Service, Inc.*, 377 F.2d 511 (5 Cir., 1967); *Moye* v. *Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5 Cir., 1968); *Parker* v. *Cargill, Inc.*, 417 F.2d 772 (5 Cir., 1969); *Berge* v. *National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S.D. N.Y., 1957); *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md., 1957), affirmed 252 F.2d 117 (4 Cir., 1958); *Warren* v. *Pacific Inland Navigation Company*, 204 F. Supp. 31 (D. Ore., 1962); *Madden* v. *United States*, 259 F. Supp. 663 (D. Mass., 1966).

Under these facts, it is respectfully submitted that Petitioner was not engaged in work traditionally that of a seaman. The Court of Appeals did not pass upon that issue, which amounts to nothing more than a question of how one characterizes the undisputed facts of this case. It is respectfully submitted, therefore, that review of those facts by this Court is unwarranted.

(d) The Doctrine of Reed v. Yaka Is Inapplicable to Drydock Workers and Petitioner's Theory Would Create an Arbitrary Distinction in the Law of the Sort This Court Sought to Eliminate in Reed v. Yaka.

In addition to what has already been said above, there is still another reason why the decision below, as well as the *Atkins* decision are not in conflict with this Court's decision in *Reed* v. *Yaka*, *supra*. In fact, it is submitted that even though this Court might conclude that the floating dry dock upon which Petitioner was injured was a "vessel" and even though this Court might conclude that Petitioner, at the time of his injury, was engaged in duties traditionally those of a seaman, this case is still not brought within the scope of the policy of *Reed* v. *Yaka* and is still barred by the Longshoremen's and Harbor Workers' Compensation Act. On this basis, and even though this Court might disagree with the *Atkins* holding that the dry dock was not a vessel, and even though this Court might feel that Petitioner was engaged in duties traditionally those of a seaman, it is respectfully submitted that the decision in this case is not in conflict with any decision of the Supreme Court. Accordingly, Petitioner's assertion that this Court must grant certiorari in order to conform the decision in the instant case to *Reed* v. *Yaka* is in error.

The following analysis of *Reed* v. *Yaka* will support the above conclusions. Reed was a longshoreman who was injured on board the S.S. Yaka, which was under the control of his employer as owner pro haec vice. Reed filed his libel in rem against the vessel to recover injuries he sustained as a result of the unseaworthiness of the Yaka. Pan-Atlantic, Reed's employer, was brought in as one of the defendants. In *Reed* it was admitted that the vessel was unseaworthy and that this unseaworthiness caused the injuries sustained by Reed. The only question before

the Court was whether or not the exclusiveness of liability provisions of the Longshoremen's and Harbor Worker's Compensation Act prevented Reed from recovering against his employer. 310 U.S. at 413.

In reaching the result that Reed could maintain the action which he had brought, this Court traced the history of the longshoreman's right to the shipowner's warranty of seaworthiness. First, in *Sieracki*, where the longshoreman was employed by an independent contractor and was not suing his employer, the Court held that the longshoreman was protected by the warranty of seaworthiness and that he could recover for any breach of that warranty. The Court emphasized the fact that like work entitled men to like protection under the doctrine of unseaworthiness. Longshoremen became entitled to the warranty of seaworthiness because they did the work of seamen.

Ten years later, in the *Ryan Stevedoring* case, the Court was faced with the second stage of the *Sieracki* situation. The injured longshoreman had recovered against the shipowner, as *Sieracki* had cleared the way for him to do. The shipowner, however, then sued the stevedoring company, the employer of the injured longshoreman, by way of indemnity, asserting the provision of the contract between the shipowner and the stevedoring company and asserting a breach of that contract as the cause of the accident in question. The stevedoring company defended on the theory that it could not be held responsible to its own employee under the doctrine of unseaworthiness because of the bar of the Longshoremen's and Harbor Workers' Compensation Act. This Court rejected that argument and held that the shipowner could recover in contract and not in tort against the stevedoring company under that set of circumstances.

All of this leads us to the situation with which the Court was faced in *Reed* v. *Yaka*. There, in the words of this Court,

> "If the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer." 373 U.S. at 414.

The Court then went on to say,

> "We think it would produce a harsh and incongruous result . . ., to distinguish between liability to longshoremen injured under precisely the same circumstances because they draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company." 373 U.S. at 415.

In short, in *Reed* v. *Yaka*, the Court was faced with the situation where one group of longshoremen whose primary duties involved the loading and unloading of ships of nonemployers were protected by the warranty of unseaworthiness, while a second group of longshoremen doing exactly the same type of work, were outside of that protection. This, the Court reasoned, was an arbitrary and unjust situation. An injured longshoreman's legal remedies, the Court stated, should not be determined by the signature on his paycheck. "All were subjected to the same danger. All were entitled to like treatment under law." 373 U.S. at 415, citing *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 413 (1953).

In *Reed* v. *Yaka*, the Court found an overriding and compelling circumstance which it felt required the ignor-

ing of the literal wording of the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act. That compelling situation was the distinction theretofore existing in the law between the remedies of longshoremen who were employed by the owner of the vessel on which they were injured and the remedies of longshoremen not employed by the owners of the offending vessels. When Reed brought his action against his employer, the Court was aware of the fact that thousands of longshoremen around the country already had, in the event of an injury, a right of action based on unseaworthiness. The question was whether or not Reed had a similar legal remedy. The Court correctly held that he did. That holding was reaffirmed, but in no way extended, by this Court in *Jackson* v. *Lykes Bros. Steamship Co., supra.*

In this case, this Court is concerned with dry dock workers working on dry docks of various types. As noted earlier in this brief, there are three basic types of dry docks, the marine railway, the graven dry dock which is within the land, and the floating dry dock. The men who worked upon these three different types of dry docks all do substantially the same type of work. There is no arbitrary and unreasoned distinction drawn between different groups of dry dock workers. Under the present state of the law, all dry dock workers are already being treated equally, the precise result for which this Court strove and achieved, in *Reed* v. *Yaka.* See *Avondale Marine Ways, Inc.* v. *Henderson, supra.* All dry dock workers injured while engaged in work upon dry docks have a remedy under the Longshoremen's and Harbor Workers' Compensation Act. As the law now stands no dry dock workers of any variety have a right to sue their employers under the general maritime law for the unseaworthiness of the dry dock upon which they are working. Equally, and without distinction,

workers on marine railways, on graven dry docks and on floating dry docks are treated alike under the law.

When viewed in terms of the underlying policy considerations of *Reed* v. *Yaka*, it is submitted that the case at bar is entirely different. Here, we are not faced with a situation where the injured worker has been denied certain legal rights that others doing identical work are entitled to. Here, we are not faced with a situation where some people doing the type work done by Petitioner are employed by the owner of the dry dock and others are employed by an independent contractor. It is common knowledge that all workers on dry docks are employed by the owner or lessee of the dry dock. When seen in this light, there is simply no "harsh or incongruous result" which has been produced by the decision below. In fact, were certiorari to be granted in this case and were this case to ultimately be reversed, it is submitted that *the Court would thereby be creating precisely the same type of arbitrary and unreasoned distinction which it eliminated in Reed* v. *Yaka*. All dry dock workers are already being treated alike by the law. Accordingly, there is no inconsistency between the decision below and this Court's decision in *Reed* v. *Yaka* which would justify granting certiorari in this case.

(e) The Jones Act and the Longshoremen's and Harbor Workers' Compensation Act Provide Mutually Exclusive Remedies for Employees Against Their Employer, and, Inasmuch As Petitioner Is Covered by the Longshoremen's Act, He Necessarily Has No Remedy under the Jones Act.

Atkins involved only a claim based on unseaworthiness. Here, Petitioner sought relief both on the basis of the alleged unseaworthiness of a "vessel" owned by Respondent and also on the basis of negligence under the Jones Act. Respondent has already demonstrated that Petition-

er's unseaworthiness claim must fail. It is respectfully submitted that the case against Petitioner's Jones Act claim is even clearer.

It is well established law that the Longshoremen's Act and the Jones Act provide mutually exclusive remedies, and that if one applies the other is automatically excluded. *Nogueira* v. *New York, N. H. and H. R. Co.*, 281 U.S. 128 (1930); *Warner* v. *Goltra*, 293 U.S. 155 (1934); *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1 (1946); *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334 (1953); *Hawn* v. *American S.S. Co.*, 107 F.2d 999 (2 Cir., 1939); *Kyles* v. *James W. Elwell & Co.*, 296 F.2d 703, 705-706 (7 Cir., 1961); *Price* v. *S.S. Yaracuy*, 378 F.2d 156, 161, fn. 11 (5 Cir., 1967); *Neal* v. *Saga Shipping Co., S. A.*, 407 F.2d 481, 486 (5 Cir., 1969); *Thomas* v. *Peterson Marine Service, Inc.*, 411 F.2d 592 (5 Cir., 1969); Gilmore & Black, *The Law of Admiralty* (1957), §6-52; Robinson, *Admiralty Law in the United States* (1939), §40; Norris, *Maritime Personal Injuries* (2d ed., 1966), §§21, 75; 2 Norris, *The Law of Seamen* (3d ed., 1970) §668.

Section 2(4) of the Longshoremen's Act defines "employer" to mean

> "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C., §902(4). (Emphasis added)

At the time of the accident involved in this case, Respondent's dry dock was being maintained in the channel of Lake Ferguson, approximately one-fourth of a mile from Warfield Point on the Mississippi River. Although the dry dock had been firmly affixed to the east bank of Lake Ferguson by cables, it was resting upon the navigable waterways of the United States. Any number of Respondent's employees, including Petitioner, were engaged in

"maritime employment", to-wit: the construction and repair of towboats, barges and other vessels. Thus, there can be no question but that Respondent was an employer within the meaning of the Longshoremen's Act. *Flowers* v. *Travelers Insurance Company*, 258 F.2d 220 (5 Cir., 1958); *Travelers Insurance Company* v. *Shea*, 382 F.2d 344 (5 Cir., 1967); *Atkins* v. *Greenville Shipbuilding Corporation, supra*, 411 F.2d at 281.

The coverage section of the Longshoremen's Act provides that compensation shall be payable because of disability or death of an employee,

> "if the disability or death resulted from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ." 33 U.S.C., §903. (Emphasis added).

By express language of the statute, injuries to shoreside workers occurring on a dry dock are covered by the Act. Here the Petitioner allegedly sustained injuries when he fell while working inside the Barge DAVID.

At the time, the barge was "high and dry" in the dry dock. Since the accident was obviously covered by the Act, Petitioner immediately filed his claim for compensation benefits and in fact has received benefits from Respondent's compensation carrier totalling $1,779.73. Respondent submits that Petitioner was covered by the Act at the time of the accident. Indeed, under the decision in *Travelers Insurance Company* v. *Shea*, *supra*, no other conclusion is possible. In that case the Court held clearly and unequivocally that

> "Injuries occurring on dry docks, which are located on navigable waters and used to raise the ship out of water to permit examination or repairs to its hull impossible while the ship is afloat, are within Longshoremen's Act coverage by express statutory inclusion." 382 F.2d at 347.

See also, *Atkins* v. *Greenville Shipbuilding Corporation*, supra. In the face of this square holding, the clear language of the statute, and the uncontradicted fact that Petitioner here was injured while working on a barge being repaired in such a dry dock, the District Court's holding that there is Longshoremen's Act coverage in this case is surely unassailable. Since the Longshoremen's Act and the Jones Act provide mutually exclusive remedies, Petitioner's Jones Act claim is clearly without merit. Certainly there is not sufficient substance to the Jones Act aspect of this case to justify granting certiorari.

(f) This Court Should Not Consider Alleged Inconsistencies in the Holdings of the United States Court of Appeals for the Fifth Circuit.

Petitioner asserts as an additional ground for the granting of certiorari that the decision below is in conflict with two other decisions of the United States Court of Appeals for the Fifth Circuit. *Offshore Co.* v. *Robison*, 266 F.2d 769 (5 Cir., 1959) and *Producers Drilling Co.* v. *Gray*, 361 F.2d 432 (5 Cir., 1967). The first of those decisions holds that a drilling rig out in the Gulf of Mexico may be held to be a "vessel" by a jury. The second of these cases holds that as a matter of law such drilling rigs are "vessels".

An important distinction between the two above cited cases and this case may be found by comparing the drilling rigs involved in *Offshore Co.* and *Producers Drilling* with the dry dock involved in the instant case. These drilling rigs are out in the Gulf of Mexico and persons working upon them are obviously subjected to the hazards and perils of the sea. Furthermore, these drilling rigs are frequently moved from place to place on the high seas as one drilling project is completed and a new one is begun. On the other hand, the dry dock involved in the instant case is in no way subject to the hazards and perils of navigation.

This dry dock is affixed to the land, and it has never been moved from the point where it was originally placed in the water on the banks of Lake Ferguson after it was constructed. Whereas, the drilling rigs may not be vessels in the traditional sense, their use and location on the high seas does justify the conclusions reached by the courts in *Producers Drilling* and other cases. On the other hand, a dry dock such as that involved here is much, much further removed from the traditional concept of a vessel than even the floating drilling rigs out in the Gulf of Mexico. Indeed, it is far more appropriate to compare the dry dock here with the marine railway and the land dry dock than it is to compare the instant dry dock with drilling rigs. See *Avondale Marine Ways, Inc.* v. *Henderson*, *supra*, 366 U.S. at 367 (concurring opinion). There is no question but that these other two types of dry docks are not vessels. Functionally, a floating dry dock is in no way different from these other two types of dry docks, and therefore it would create an arbitrary and absurd distinction in the law to call floating dry docks "vessels" while other dry docks are not "vessels". Accordingly, we submit that neither the instant case nor *Atkins* is in conflict with the other decisions of the United States Court of Appeals for the Fifth Circuit cited above.

It is apparent from a reading of the opinion of the Court of Appeals in *Atkins* that the panel which decided the case saw no conflict in this decision and the cases mentioned above. It is noteworthy that Judge Thornberry, who wrote the opinion for the Court in *Producers Drilling Co.* v. *Gray*, was a member of the panel in both *Atkins* and in the instant case below. Surely, if Judge Thornberry had seen a conflict in the decision below and his own opinion in *Producers Drilling*, he would have found some appropriate method of expressing his views. Respondent submits,

of course, that Judge Thornberry found no conflict in the instant case and *Producers Drilling* for the reason that no conflict exists. Therefore, this Court certainly should not become embroiled in such an imaginary controversy within the Fifth Circuit.

CONCLUSION

For the reasons stated above, Respondent respectfully and with deference suggests that there are no special or important reasons present in this case to support the granting of the Petition for a Writ of Certiorari. The decisions of the Court of Appeal in *Atkins* and in the instant case are sound. There is no reason for further review.

Respectfully submitted,

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CERTIFICATE

I, JAMES L. ROBERTSON, member of the Bar of this Court, hereby certify that I have this day mailed, postage prepaid two true copies of the above Brief in Opposition to Certiorari To Fountain D. Dawson, Esq., P. O. Box 1151, Greenville, Mississippi 39701 and to Robert G. Hebert, Esq., 608 American Bank Building, New Orleans, Louisiana 70130.

This 10th day of November, 1970.

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JAMES L. ROBERTSON